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ARNOLD & PORTER LLP

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Michael B. Gerrard  
Michael.Gerrard@aporter.com

212.715.1190  
212.715.1399 Fax

399 Park Avenue  
New York, NY 10022-4690

August 14, 2006

217272

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 700  
Washington, D. C. 20423

34903

RE: Finance Docket No. 34905, Buffalo Southern Railroad, Inc. - Acquisition  
and Operation Exemption—Line in Croton-on-Hudson, NY

Dear Secretary Williams:

The Buffalo Southern Railroad, Inc. ("BSOR") intends to begin operations in the Village of Croton-on-Hudson (the "Village") over the 1,600-foot track at 1A Croton Point Avenue (the "Track") on or about August 15, 2006, contrary to the decision served by the Surface Transportation Board (the "Board") on July 3, 2006, which stayed the effective date of the exemption. The Village respectfully requests the Board expeditiously to enforce its decision and order BSOR to cease and desist from blatantly disobeying the Board's decision.

BSOR has returned to the U.S. District Court for the Southern District of New York seeking a ruling that the transportation of certain commodities would not violate the May 17, 2006 order of the Court. Despite the tenor of BSOR's petition, it is actually a request to the Court for authority to operate over the Track. However, BSOR is attempting to put the Court in an awkward position, as the Court lacks jurisdiction to authorize rail operations. As the Board well knows, the jurisdiction to authorize rail operations is within the exclusive jurisdiction of the Board. Not only is BSOR proposing to ignore the Board's decision of July 3, but it is seeking to supplant the Board's exclusive and plenary jurisdiction with that of the Court, and is doing so on unconscionably short notice.

The Village urges the Board to enforce its exclusive and plenary jurisdiction over the rail operations by ordering BSOR to cease and desist from operating over the Track in accord with its July 3 decision.

BSOR's letter to the Court, our response, and BSOR's reply are attached. Our response shows that the proposed operations pose serious environmental problems, and

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## ARNOLD & PORTER LLP

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Honorable Vernon A. Williams

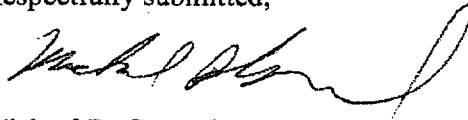
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are prohibited by local zoning. The Court has not acted; we have been advised that Judge McMahon is on vacation until Thursday.

This letter is being efiled. By my signature below, I certify that a copy of this letter has been served by electronic mail and first class mail postage pre-paid on all parties of record.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael B. Gerrard", with a stylized, flowing script.

Michael B. Gerrard

cc: John McManus, Esq.  
James Howard, Esq.



CRANE, PARENTE, CHERUBIN & MURRAY

*Attorneys and Counsellors at Law*

JAMES B. CRANE, II  
CLEMENTE J. PARENTE  
DAVID M. CHERUBIN  
JACQUELINE PHILLIPS MURRAY

August 9, 2006

JOHN T. McMANUS  
GREGORY A. MOUNTAIN  
THOMAS M. KERNAN

OF COUNSEL:  
DENNIS C. VACCO  
ALAN E. STEINER  
HELENA HEATH-ROLAND

VIA FACSIMILE 914/390-4152

Hon. Colleen McMahon  
U.S. District Court  
Southern District of New York  
U.S. Courthouse, Room 533  
300 Quarropas Street  
White Plains, New York 10601

Re: Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, et al  
Case No.: 06 CIV. 3755 (CM)

Dear Judge McMahon:

I write on behalf of Plaintiff Buffalo Southern Railroad, Inc. ("BSOR") to update the Court about BSOR's current and proposed operations at the Croton Yard, among other things. Further, BSOR seeks confirmation from the Court that certain of BSOR's proposed operations will not run afoul of the condition that the Court imposed as part of its "Decision and Order Granting Plaintiff's Motion for a Preliminary Injunction" dated June 12, 2006 (the "Preliminary Injunction").

As the Court noted in the Decision, "[a]s of the date of this opinion, plaintiff has not reached an interchange agreement with CSX, the owner of the main line through town. 2d Feas. Aff. ¶4. Absent such an agreement, BSOR's carriage of freight starts and stops within the confines of the Yard." Slip op. at 7-8. Recently, however, BSOR and CSX negotiated and executed an "Interim Track Agreement" (the "ITA"). Among other things, the ITA provides that

"CSXT agrees, pursuant to the provisions of this Agreement, its tariffs, circulars, rules and rail transportation contracts, to operate over the Tracks in the delivery, placement and removal of railcars consigned to or ordered by various rail customers, at such times established by CSXT. BSOR will then switch the railcars to loading/unloading for the railcars, perform such loading or unloading of railcars for the rail customers and reposition the railcars on the Tracks for retrieval by CSXT."

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In sum, the ITA provides for and governs the exchange and movement of rail cars between BSOR and CSX at the Croton Yard.

With the ITA now in place, CSX will finally deliver the three rail cars from Coastal Distribution, LLC ("Coastal") containing sand and other building materials to the BSOR Croton Yard. These cars have been held by CSX since late May 2006. Coastal now seeks to enter into two new long-term agreements with BSOR concerning transloading and transporting certain commodities at and from the Croton Yard.

#### First Proposed Agreement

The First Proposed Agreement between BSOR and Coastal involves the transloading and transportation of gypsum from a plant owned by Lafarge North America ("Lafarge") in Buchanan, New York to a sister plant in Palatka, Florida. Under this Agreement, Coastal will deliver the gypsum by truck to the BSOR Croton Yard from the local Buchanan plant, which is approximately six (6) miles away. The gypsum will be deposited on the floor of the enclosed building at the Croton Yard. There will be no dust because the transloading will take place in an enclosed building and the gypsum will be kept moist at all times. Indeed, because it will be kept moist, the gypsum will be in the form of bowling ball-sized "balls," rather than a powder. Next, using a front-end loader, BSOR will load the gypsum onto gondola rail cars provided by Lafarge for rail transportation to Palatka. There, the gypsum will be recycled for subsequent use in the manufacture of sheetrock. Coastal anticipates that approximately ten (10) trucks will deliver the gypsum to the Croton Yard per day. In turn, the gypsum will be transloaded into three (3) rail cars per day.

#### Second Proposed Agreement

The Second Proposed Agreement between BSOR and Coastal involves the transloading and transportation of sheetrock "tailings" from Lafarge's Buchanan plant to an out-of-state landfill. Tailings are a mix of gypsum and paper that are the result of "squaring off" or finishing sheetrock for sale. Under this Agreement, the tailings will be loaded into leak-proof, closed intermodal containers at the Buchanan plant. Coastal will then transport these containers to the Croton Yard by truck. BSOR will then transload the containers onto rail cars for transportation out of New York State. Initially, Coastal anticipates that it will deliver four (4) containers to the Croton Yard per day via four (4) trucks. Only one (1) rail car is needed for every four (4) intermodal containers. By mid-October, Coastal anticipates that it will deliver up to sixteen (16) containers to the Croton Yard per day. Thus, four (4) rail cars will be loaded each day.

Coastal and Lafarge desire to enter into these agreements with BSOR because shipment of these commodities by truck between, for example, Buchanan, New York and Palatka, Florida (approximately 1,050 miles by road) is prohibitively expensive, especially with the seemingly-daily rise in fuel prices. The Croton Yard, on the other hand, is located within six (6) miles of Buchanan and BSOR has rail access to the national rail network, making it an ideal partner for these types of agreements. Likewise, the commodities that Coastal seeks to ship are perfect for rail transportation: they are not time sensitive (i.e., not perishable) and are dense. Coastal and Lafarge are exactly the type of customers to which BSOR seeks to offer its common carrier

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service: companies that lack their own local direct rail access, but who want to utilize the national rail network to ship goods at a substantial discount from trucking.

#### The Preliminary Injunction

The Court conditioned the grant of the Preliminary Injunction against the Village of Croton-on-Hudson (the "Village") on BSOR not "accept[ing] solid waste as defined by New York State regulations." Slip op. at 28. This condition was imposed based on the Court's explicit concern that, without it, the Preliminary Injunction would effectively "overturn[] the work of the New York State Supreme Court." *Id.* at 27. Although it was not cited, presumably, the condition was directed at the pending preliminary injunction the Village secured from New York State Supreme Court, Westchester County against Northeast Interchange Railway, LLC ("NIR") and Greentree Realty, LLC ("Greentree"),<sup>1</sup> enjoining those entities "from operating a transfer station at the Property without first obtaining a special permit in accordance with the Village's Zoning Code." Village of Croton-on Hudson v. Northeast Interchange Railway, LLC, No. 221176/05 (Sup Ct, Westchester County).<sup>2</sup>

Transloading and transporting the recyclable gypsum in gondola rail cars and the tailings in leak-proof, sealed intermodal containers will not run afoul of the above condition. Specifically, the recyclable gypsum is not "solid waste." For example, the gypsum is not "garbage" or "refuse" that is being "discarded;" rather, it is a raw material that will be recycled for use in the manufacturing of new sheetrock. 6 N.Y.C.R.R. § 360-1.2 (a) (1), (a) (2), and (a) (4) (viii). Further, in transloading and transporting the tailings, BSOR will not be operating a "transfer station," which is what the State court preliminary injunction -- that the Court sought to protect via the above condition -- prohibits in the absence of a special permit. A "transfer station" is defined as

"a solid waste management facility other than a recyclables handling and recovery facility, used oil facility, or a construction and demolition debris processing facility, where solid waste is received for the purpose of subsequent transfer to another solid waste management facility for further processing, treating, transfer or disposal. . . . Transfer of leakproof, closed containers of solid waste from vehicle to vehicle, including truck to train, for the purpose of consolidating loads for shipment to an authorized disposal or treatment facility, is not considered a transfer station provided: the contents of each container remain in their closed container during the transfer between vehicles; storage remains incidental to transport at the location where the containers are consolidated; containers are acceptable to the department and maintained in a safe, nuisance-free (e.g., dust, odor, noise, etc.) manner; and, the transfer location is under the ownership or control of the transporter."

6 N.Y.C.R.R. § 360-1.2 (b) (172) (emphasis added). Here, the tailings will be in leak-proof, closed intermodal containers; the contents of each container will remain in their closed container

<sup>1</sup> Neither NIR nor Greentree is a party to this action. BSOR is not a party to or subject to the State court injunction.

<sup>2</sup> NIR and Greentree are perfecting their appeal of this Decision to the Appellate Division, Second Department.

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during the transfer between truck and rail car; any storage will remain incidental to transport from the Croton Yard; the containers are and will be maintained in a safe, nuisance-free manner; and, the transfer location is under BSOR's control. Thus, this activity will not create a "transfer station."

In sum, the proposed agreements between BSOR and Coastal do not infringe upon the condition the Court imposed as part of the Preliminary Injunction. Nevertheless, BSOR seeks confirmation of this from the Court in advance so that BSOR does not inadvertently run afoul of this condition. The above shipments are expected to begin on August 15, 2006. Therefore, confirmation of these agreements would be appreciated before that date.

Additional Proceedings

Finally, BSOR writes to inform the Court that, on June 29, 2006, BSOR filed a Verified Notice of Exempt Transaction (the "Notice") (Finance Docket No. 34903) with the Surface Transportation Board (the "STB"). In doing so, BSOR invoked the class exemption procedure by which Class III carriers may obtain STB authorization to operate additional lines. In the Notice, however, BSOR notes that the Croton Track is an excepted track under 49 U.S.C. § 10906 and that, as a result, BSOR intended to move to dismiss the Notice. BSOR did so the following day. Thus, BSOR has squarely framed before the STB the line-excepted track issue that the Court noted in its Decision.

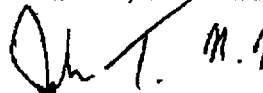
Subsequently, the Village filed a "Petition of the Village of Croton-on-Hudson to Reject Notice of Exemption or, in the Alternative, for Stay of Effectiveness and for Consolidation" (the "Petition") with the STB. The Petition requests that the Notice be consolidated with a complaint that the Village filed concurrently with the STB against BSOR and other entities.

On July 3, 2006, the Board entered a "housekeeping stay" of the effectiveness of the Notice. As of the date of this letter, the STB has not rendered any determinations concerning any of the above filings.

I am available to answer any questions that you may have about the above updates. Thank you for your attention in these matters.

Very truly yours,

CRANE, PARENTE, CHERUBIN & MURRAY



John T. McManus

JTM/ek

cc: Michael Gerrard, Esq. (via facsimile)

04073\Correspondence\Judge McMahon Ltr8

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# ARNOLD & PORTER LLP

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Michael B. Gerrard  
Michael.Gerrard@aporter.com  
212.715.1190  
212.715.1399 Fax  
399 Park Avenue  
New York, NY 10022-4690

August 11, 2006

**Via Facsimile**

Hon. Colleen McMahon  
U.S. District Court  
Southern District of New York  
U.S. Courthouse, Room 533  
300 Quarropas Street  
White Plains, New York 10601

Re: Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, et al.  
Case No. 06 CIV. 3755 (CM)

Dear Judge McMahon:

Late Wednesday, August 9, we received the letter from counsel to Plaintiff Buffalo Southern Railroad, Inc. ("BSOR") asking Your Honor for "confirmation" that certain of BSOR's proposed operations -- revealed for the first time in that letter -- planned to commence next Tuesday, August 15, would not violate the Court's prior directions. The Village of Croton-on-Hudson and the other named defendants (the "Village") hereby oppose that request.

The proposed operations are not allowed at 1A Croton Point Avenue under the Village Zoning Code, either as-of-right or by special permit. Hence BSOR can undertake them only by use of the preemption provisions of the Interstate Commerce Commission Termination Act. The issue of whether BSOR is lawfully operating in the Village is now before the Surface Transportation Board ("STB") in two proceedings -- the Verified Notice of Exempt Transaction, referenced in Mr. McManus's letter, and a Complaint instituted in the STB by the Village against BSOR, Northeast Interchange Railway, RS Acquisitions and Greentree Realty LLC. The STB has rejected BSOR's request that its claimed exemption automatically go into effect (the STB decision is attached), but it has not otherwise ruled.

By its August 9 letter, BSOR is attempting an end run around the STB procedure, and asks this Court, with four working days' notice, to bless two proposed long-term agreements that BSOR seeks to sign with Coastal Distribution, LLC. These agreements

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## ARNOLD & PORTER LLP

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August 11, 2006

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have clearly been in the works at least since BSOR's filing with this Court of May 16, 2006, in which BSOR held out Coastal as its chief customer.

Both operations involve handling large quantities of gypsum and gypsum waste. The need for an immediate response has prevented the Village from assembling a full set of affidavits and exhibits about the environmental implications of this proposal. However, as we have learned from consultations with professional engineers, the proposal is very troubling.

Gypsum (calcium sulfate dihydrate) is extracted from certain rocks, and it is also a byproduct of various industrial processes, most notably fertilizer manufacture. Depending on its origin, it may contain other materials, such as trace metals including radioactive uranium. We do not know the origins of the gypsum BSOR wants to handle. The Occupational Safety and Health Administration (OSHA) has established limits for airborne exposure to gypsum dust.

BSOR, acknowledging that gypsum easily becomes dusty, proposes to keep the gypsum moist at all times when it is within the processing building in Croton-on-Hudson. This presumably will require the generous application of water. We are not told what will happen to the inevitable runoff. The subject building is not connected to a sanitary sewer; instead, wash water is piped to a holding tank, from which it is pumped onto tanker trucks for removal. That tank was not sized for an operation that is constantly being doused with water, and we are skeptical that its capacity is sufficient.

BSOR says no dust could escape because the building is enclosed, but in fact it has three very large openings -- one for trucks, and two for the entry and exit of rail cars. We are not told if the exiting trucks -- which will be muddy, dusty, or both -- will be sprayed to prevent gypsum from being tracked into the nearby community. Nor are we told if the departing gondola rail cars will be covered.

In short, this is far from the inert building materials, such as bricks and tiles, that BSOR first claimed to want to handle when it made its prior midnight submission to this court. The gypsum tailings are indisputably solid waste, and thus fall within this court's direction that BSOR may not handle solid waste during the pendency of the preliminary injunction. The proposed use may not be a "transfer station" within the terms of Justice Nicolai's order of April 25, 2006 that no transfer station may operate at the site without a special permit from the Village, but that order was merely addressing the use that was proposed for the site -- it certainly did not constitute a finding that a gypsum and gypsum waste handling facility could operate without any state, county or local controls, as BSOR is now attempting.



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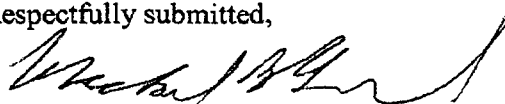
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August 11, 2006

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Respectfully submitted,



Michael B. Gerrard

Attachment

cc: John T. McManus (via facsimile)

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CO

SERVICE DATE – LATE RELEASE JULY 3, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34903

BUFFALO SOUTHERN RAILROAD, INC.—ACQUISITION AND OPERATION  
EXEMPTION—LINE IN CROTON-ON-HUDSON, NY

Decided: July 3, 2006

This decision grants a housekeeping stay of the effective date of the exemption in this proceeding.

BACKGROUND

On June 29, 2006, Buffalo Southern Railroad, Inc. (BSOR), a Class III rail carrier, filed a verified notice of exemption under 49 CFR 1150.41 to acquire and operate a rail line on which it has been operating under a lease in Croton-on-Hudson, NY.<sup>1</sup> The line is approximately .3 miles in length, and connects with CSX Transportation, Inc.'s Hudson Line at approximately milepost QC 35 in Croton-on-Hudson, NY.<sup>2</sup> BSOR also filed a motion to dismiss its notice of exemption on June 30, 2006, on the grounds that the line is excepted track within the meaning of 49 U.S.C. 10906.

On June 30, 2006, the Village of Croton-on-Hudson, New York (Village) filed a petition in opposition to BSOR's notice of exemption. The Village asks the Board to reject the notice because it is defective and contains false information. The party claims that BSOR has failed to properly certify whether its projected annual revenue after the transaction will exceed \$5 million. See 49 CFR 1150.33(g). The Village also claims that, because BSOR's projected revenues will exceed \$5 million, the carrier must meet the labor notice requirements at 49 CFR 1150.42(e).

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<sup>1</sup> Greentree Realty, LLC (Greentree) owns the line, which has been leased to RS Acquisition Co., LLC (RSA). Both Greentree and RSA are noncarriers.

<sup>2</sup> The line was the subject of two other Board proceedings, STB Finance Docket Nos. 34734 and 34735. See Northeast Interchange Railway, LLC—Lease and Operation Exemption—Line in Croton-on-Hudson, NY, STB Finance Docket No. 34734, et al. (STB served Nov. 18, 2005). The line was also at issue in Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, et al., No. 06 Civ. 3755 (S.D.N.Y. June 12, 2006) (preliminary injunction granted).

In case the Board does not reject the notice, the Village asks that the exemption's effective date be stayed so that the Board can fully consider the complaint it filed on June 30, 2006.<sup>3</sup> In that pleading, the Village complains that BSOR has not received authority from the Board under 49 U.S.C. 10902 to operate as a common carrier on the instant line, and that BSOR has therefore unlawfully held itself out as a common carrier here. The Village further complains that Greentree, RSA, and Greentree's former lessee, Northeast Interchange Railway, LLC, have knowingly authorized, consented to, and permitted BSOR to operate in violation of 49 U.S.C. 10902. The complainant requests that the Board: (1) order BSOR and its affiliates to cease and desist their unlawful operations; (2) fine the parties under 49 U.S.C. 11901; and (3) require BSOR to file an application under 49 U.S.C. 10902 to receive the requisite authority.

#### DISCUSSION AND CONCLUSIONS

A housekeeping stay of the effective date of the exemption is appropriate to provide sufficient time for the Board to fully consider the issues presented by the parties. Thus, the exemption will be stayed until further order of the Board.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The effective date of the exemption in this proceeding is stayed until further order of the Board.
2. This decision is effective on its date of service.

By the Board, W. Douglas Buttrey, Chairman.

Vernon A. Williams  
Secretary

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<sup>3</sup> See STB Finance Docket No. 34905, Village of Croton-on-Hudson, New York v. Buffalo Southern Railroad, Inc. et al.



CRANE, PARENTE, CHERUBIN & MURRAY

*Attorneys and Counsellors at Law*

JAMES B. CRANE, II  
CLEMENTE J. PARENTE  
DAVID M. CHERUBIN  
JACQUELINE PHILLIPS MURRAY

August 11, 2006

JOHN T. McMANUS  
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OF COUNSEL:  
DENNIS C. VACCO  
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VIA FACSIMILE 914/390-4152

Hon. Colleen McMahon  
U.S. District Court  
Southern District of New York  
U.S. Courthouse, Room 533  
300 Quarropas Street  
White Plains, New York 10601

Re: Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, et al  
Case No.: 06 CIV. 3755 (CM)

Dear Judge McMahon:

On behalf of BSOR,<sup>1</sup> I write in response to the Village's earlier letter to this Court.

By its silence on the matter, the Village concedes that the recyclable gypsum is not "solid waste." 6 N.Y.C.R.R. § 360-1.2 (a) (1), (a) (2), and (a) (4) (viii). Instead, the Village attempts to shift the focus on the First Proposed Agreement to irrelevancies such as certain unnamed Occupational Safety and Health Administration "limits for airborne exposure to gypsum dust." Besides the fact that BSOR has already indicated that there will be no dust because the transloading will take place in an enclosed building and the gypsum will be kept moist at all times (not flooded, as the Village implies),<sup>2</sup> as BSOR has previously stated to the Court, BSOR will comply with all applicable federal statutes and regulations in its rail transportation operations. Similarly, as to the Second Proposed Agreement, the Village concedes that the transloading and transportation of the gypsum tailings in leak-proof, closed intermodal containers will not be a "transfer station" within the terms of the State court preliminary injunction this Court sought to protect by the subject condition. In sum, the proposed agreements between BSOR and Coastal do not infringe upon the condition the Court imposed as part of the Preliminary Injunction.

<sup>1</sup> The terms used herein are as defined in BSOR's letter to the Court dated April 9, 2006, except where specifically noted.

<sup>2</sup> To the extent that it is even relevant, the gypsum will be wetted at the Buchanan plant prior to being transported to the Croton Yard. The gypsum will then be transloaded immediately from the building to the rail cars for transportation. Thus, contrary to the Village's supposition, there will not be any "runoff" at the Yard.

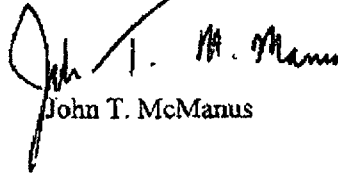
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A few additional points deserve mention. First, the Village contends that the STB "rejected BSOR's request that its claimed exemption automatically go into effect." This misstates the STB's holding in its decision dated July 3, 2006. The STB did not "reject" BSOR's Notice; rather, it merely entered a "housekeeping stay of the effective date of the exemption in this proceeding." The STB commonly imposes this type of stay "to provide sufficient time for the Board to fully consider the issues presented by the parties." In other words, BSOR's Notice is still pending and is presently under consideration before the STB. In any event, after holding that the Village's statutes and regulations that do or would regulate BSOR's rail operations are preempted by the ICCTA, this Court held that "the legality of BSOR's operations does not affect federal preemption." Slip op. at 13. Thus, the Village's discussion of the STB proceedings is irrelevant to BSOR's request for confirmation of the two proposed agreements. Further, the Village alleges that "[t]hese agreements have clearly been in the works for at least since BSOR's filing with this Court of May 16, 2006, in which BSOR held out Coastal as its chief customer." This statement is speculative and false. In fact, Coastal did not make these proposals to BSOR until on or about July 19, 2006. See attached letter.

Thank you for your attention in these matters.

Very truly yours,

CRANE, PARENTE, CHERUBIN & MURRAY



John T. McManus

JTM/ek

Enclosure

cc: Michael Gerrard, Esq. (via facsimile)

04073\Correspondence\Judge McMahon Ltr9

**COASTAL DISTRIBUTION, LLC**

1633 New Highway Farmingdale, New York 11735

Tel: 631-756-2000  
Fax: 631-756-2001

VIA FACSIMILE & US Mail

July 19, 2006

Mr. Bert Feasley  
Buffalo Southern Railway  
8600 Depot Street  
Eden, New York 17057

Re: Intermodal shipments from Croton New York for Lafarge Buchanan

Dear Mr. Feasley,

As per our recent conversations, please let this letter serve as formal notification of Coastal Distributions need to ship intermodal railcars from your rail yard in Croton, New York. Coastal Distribution, LLC and Lafarge NA, Buchanan Wallboard Division have finalized our transportation agreements to ship intermodal rail (containerized) gypsum trimmings, wallboard rejects from their Buchanan, New York plant. We expect to commence shipments by August 15, 2006. Please advise me in writing, that BSOR will be able to accommodate the shipments in a timely manner. The contract initially calls for Coastal to ship 4 intermodal containers per day and will ramp up to 16 containers per day by Mid-October.

This contract represents a significant opportunity for Coastal Distribution to further strengthen our relationship with Lafarge NA. As you are aware Coastal is the exclusive agent for Lafarge NA, at their Lordstown Construction Recovery division. With this in mind we must make every effort to insure that we meet or exceed the service levels expected, so as not to jeopardize our exclusive relationship.

I thank you for your attention to this matter. I remain,

Sincerely yours,

  
Joseph Rutigliano  
Member